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No. 92-487

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS[1]

Our petition sought review of three questions. The first was whether a land use ordinance that is found to be a reasonable means of achieving a legitimate public purpose, and is not found to effect a "taking," may nevertheless be held to be "unduly oppressive" in violation of substantive due process guaranteed by the Fourteenth Amendment. Respondents agree that this question warrants this Court's review and devote the first section of their brief in opposition to a discussion of its merits.

The second question presented in our petition is whether continued general enforcement (against nonparties) of a land use ordinance, after a state trial court has declared it invalid but before any appellate ruling, is in itself a violation of "substantive due process" giving rise to a damage remedy under 42 U.S.C. § 1983. We argued that mere nonacquiescence in a trial court's decision falls far short of the kind of "egregiously unacceptable, outrageous, or conscience-shocking" behavior that gives rise to a constitutional damage claim. (Pet. 20, quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990) *cert. denied*, 111 S. Ct. 713 (1991)); *see also Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217-1222 (6th Cir. 1992) (collecting cases).

Respondents, citing no federal cases, merely recite (Br. in Opp. 4-5) some of the facts of *Robinson* and *Sintra*

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the City of Seattle is a municipality and, as such, has no parents or subsidiaries. All of the other petitioners are individuals.

(making various factual errors and misleading assertions),[2] adding modifiers like "wilful, deliberate and malicious" (Br. in Opp. 5) that are not based on any finding of the state courts. However, the City does not argue, as respondents assert (Br. in Opp. 5), that "it may disregard trial court decrees of facial invalidity with impunity."[3] We do argue that the Due Process Clause does not mandate application of offensive nonmutual collateral estoppel against a local government that believes in good faith that a state trial court has erred in ruling that an ordinance conflicts with state law and therefore continues to apply that ordinance to nonparties pending resolution of the issue by a higher court.[4] The Washington Supreme Court's ruling that such conduct

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[2] For example, only the replacement housing provisions of HPO I were declared facially invalid; HPO II did differ significantly from HPO I (as acknowledged in *Robinson*, Pet. App. 3a-4a, and in *San Telmo Assocs. v. Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987)); and Sintra was granted relief from and never paid the $219,000 for replacement housing.

[3] The city can be subjected to liability *under state law* if its belief that the ordinance ultimately will be held valid is shown to have been erroneous, as demonstrated by the disposition of state law claims in *Robinson*.

[4] Nor must a city take an appeal (which may be unwarranted for any number of reasons, *see* Pet. 18 n.12), as the price of avoiding damages under federal law for any future enforcement of the ordinance. Respondents argue that the trial court rulings on HPO II had collateral estoppel effect pending the city's appeals, citing state law authorities, but they ignore the well established rule in Washington that that doctrine does not blindly foreclose relitigation of important issues. *See, e.g., Southcenter Joint Venture v. NDPC*, 113 Wash. 2d 413, 780 P.2d 1282 (1989), citing *Kennedy v. Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980).

exposes the local government to liability under § 1983 is both important and wrong.

The third question presented in our petition is whether the continued enforcement of the HPO upon advice of official counsel, after a trial court ruling in another case, violated a "clearly established" federal constitutional right, so as to deprive the individual petitioners of qualified immunity. In response, respondents offer no argument or authority whatever for the proposition that any constitutional right at issue here was "clearly established." Instead, with some misstatements of fact,[5] respondents seek to turn the question into whether advice of counsel is an absolute defense, and argue that petitioners are proposing a purely subjective test.

Respondents' diversionary tactic must fail. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity protects city officials unless the plaintiff carries its burden of proving a violation of a "clearly established" federal right. Under *Anderson v. Creighton*, 483 U.S. 635,

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[5] For example, the statement that the City Attorney's advice was "a tactical decision . . . to reap ill-gotten gains", Br. in Opp. 6, has no support in the record. Respondents also state that City officials acted "contrary to the advice of the City Attorney" in declining to provide full administrative relief to Sintra (Br. in Opp. 7), but the record shows the City Attorney's office merely *recommended* against a particular condition on that relief, while advising that "the Ordinance is still valid and should be enforced." *Sintra* CP 316-17. Finally, the remark by James Fearn, a former Assistant City Attorney (Br. in Opp. 6), was only that the courts would have "no problem" finding a taking *in a case where the HPO would deny all economically viable use. Robinson* CP 121.

641 (1987), immunity applies if a reasonable official *could have believed* her actions to be lawful in light of clearly established law. We did not argue that legal advice is dispositive, although it is plainly relevant to the inquiry. We did argue that no clearly established federal right is involved in this case and that the Washington Supreme Court erred by flatly refusing to consider official legal advice and by failing to determine whether the individual petitioners could reasonably have believed that their actions did not violate any clearly established federal right. *See Romero v. Kitsap County*, 931 F.2d 624, 630 (9th Cir. 1991) (arresting officer who knew of trial court bench ruling condoning plaintiff's actions nonetheless enjoyed qualified immunity, since his further knowledge that prosecutors did not accept the ruling and would appeal would lead a reasonable officer to "conclude that the law was still in controversy rather than clearly established").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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